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No. 08-65

IN THE

Supreme Court of the United States

KEVIN NEILSON, GRINDROD INTERNATIONAL LIMITED and ATLAS TRADING AND SHIPPING LIMITED,

Petitioners,

v.

SEABOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6 ...	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
DISCUSSION	1
A. The Relevant Undisputed Facts Fully Support Granting The Petition	1
B. Neilson's Arbitration Agreement Is Enforceable Under The Convention	3
C. The FAA Is Not Preempted By The Convention	4
D. There Is A Split Of Authority On The Proper Interpretation Of Article II(2)'s Writing Requirement	8
E. The Missouri Court Of Appeals Erred In Failing To Refer Issues Of Arbitrability To The Arbitrators Pursuant To The Clear And Unmistakable Provisions Of The Employment Agreement And The Asset Purchase Agreement	10
CONCLUSION	13

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Contec Corp. v. Remote Solution Co. Ltd.,
398 F.3d 205 (2d Cir. 2005) 11

Doctor's Associate v. Casarotto,
517 U.S. 681 (1996) 12

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 10, 11

Interocean Shipping Co.
v. National Shipping and Trading Corp.,
523 F.2d 527 (2d Cir. 1975) 6

Kahn Lucas Lancaster, Inc.
v. Lark International, Ltd.,
186 F.3d 210 (2d Cir. 1999) 6, 9

Sphere Drake, Inc. PLC v. Marine Towing, Inc.,
16 F.3d 666 (5th Cir. 1994) 6, 8-9

Terminix International Co., LP
v. Palmer Ranch LP,
432 F.3d 1327 (11th Cir. 2005) 11

Cited Authorities

Page

FEDERAL STATUTES

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ... 3

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq* 3

9 U.S.C. § 1 4

9 U.S.C. § 2 ..... 4, 5, 9

9 U.S.C. § 3 ..... 5, 7

9 U.S.C. § 4 5

9 U.S.C. § 9 5

9 U.S.C. § 10 5

9 U.S.C. § 11 5

9 U.S.C. § 201, Art. II(2) 3, 5, 9

9 U.S.C. § 207 ..... 5, 7

9 U.S.C. § 208 6

DISCUSSION

Respondents attempt to recast the issues in this petition as unique and unimportant factual disputes, but the truth is that this case presents significant and recurring legal questions about the proper interplay of the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In particular, it presents the important question of whether an arbitration provision in an otherwise enforceable contract should be held unenforceable pursuant to the Convention because the contract was not signed by the party seeking to compel arbitration, notwithstanding that the arbitration agreement would be fully enforceable under Chapter 1 of the FAA. The petition also presents the important question of whether a court may perform a "threshold" analysis of the arbitrability of the disputes at issue where the parties have clearly and unmistakably agreed to submit issues of arbitrability to the arbitrators. In sum, the petition for Writ of Certiorari should be granted.

A. *The Relevant Undisputed Facts Fully Support Granting The Petition*

While Respondents repeatedly contend in their opposition brief (*see, e.g.*, Br. 16),[1] that all of the facts relevant to this dispute are "undisputed," this is not accurate.[2] It *is* true, however, that all of the facts

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[1] References to "Br." shall mean Respondents' Brief In Opposition.

[2] Indeed, one of the central disagreements is whether Neilson's Employment Agreement with SOL was in effect at (Cont'd)

relevant to the question of whether to grant this petition are undisputed and that they counsel strongly in favor of so doing. Specifically:

1. Neilson started working for SOL in Bermuda in 1999 and Neilson and SOL both signed an employment agreement dated February 15, 1999, which contained an arbitration agreement identical to the one here at issue calling for arbitration in New York pursuant to arbitration rules of the American Arbitration Association.[3]

2. A new Employment Agreement dated January 1, 2001, also containing an arbitration clause incorporating the AAA Rules was prepared by SOL, duly signed on behalf of SOL, and delivered to Neilson in connection with his continued employment at SOL;

3. Although Neilson did not sign the 2001 Employment Agreement, he did continue to

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(Cont'd)

the relevant time, and that issue turns on the question of whether Neilson's employment with SOL terminated when he moved from North Carolina to Kansas in 2002. Neilson contends that his employment never changed after he joined SOL in 1999 and that the 2001 Employment Agreement, which contained the arbitration clause here at issue, continued to govern up until the time of his resignation in April 2005.

[3] At the time Neilson originally made this motion to the Missouri trial court, he did not have in his possession a copy of this agreement, and so a copy was not part of the record below. It has subsequently been produced by the plaintiffs/respondents in the course of discovery.

work for—and get paid by—SOL thereafter pursuant to its terms.

In other words, it is not legitimately in dispute that there was an employment agreement between SOL and Neilson after January 1, 2001 notwithstanding that Neilson never actually signed the contract. The factual dispute concerns only the question of whether that contract continued to govern after Neilson moved to Kansas in 2002.[4] This issue, however, should not have been passed upon by the courts below. Having established that a contract existed between Neilson and SOL relating to his employment, the question of whether that contract was still in effect and governing at the time of the disputes should have been referred to the arbitrators pursuant to the clear and unmistakable terms of the American Arbitration Association Rules incorporated therein, which provided that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, *including any objections with respect to the existence, scope or validity of the arbitration agreement.*" (LF 1087)(Emphasis added).

B. *Neilson's Arbitration Agreement Is Enforceable Under The Convention*

Respondents suggest (Br. 17) that Petitioners do not contest the lower court's determination that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* (the

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[4] There is also, of course, the "legal" dispute concerning whether the arbitration provision of that contract is enforceable; that issue is discussed further below.

"Convention"), did not apply to Neilson's Employment Agreement, but this is not the case. Indeed, Petitioners make clear at pp. 19-22 of their Main Brief their position that the Missouri Court of Appeals applied much too narrow an interpretation of the Convention and should have concluded that Neilson's Employment Agreement, which was drafted and signed by SOL, and thereafter tendered to and performed under by Neilson, was an agreement "signed by the parties or contained in an exchange of letters or telegrams" within the meaning of Article II(2) of the Convention. Such a holding is consistent with the broad Federal policy favoring enforcement of agreements to arbitrate (as embodied in Chapter 1 of the FAA and the decisions of this Court), and also with the stated intent of the United Nations Commission on International Trade ("UNCITRAL"), the official United Nations body responsible for unification of the law of international trade.

C. *The FAA Is Not Preempted By The Convention*

Respondents' contention (Br. 18-19) that the Convention preempts Chapter 1 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, reveals a fundamental misunderstanding of the function and interplay of these two bodies of law. Chapter 1 of the FAA, enacted as Federal law in this country long before the Convention, established a Federal policy of encouraging arbitration and a legal framework for enforcing arbitration agreements where Federal interests are implicated (*i.e.*, in cases involving interstate commerce or maritime contracts). *See, e.g.*, 9 U.S.C. §§ 1, 2. The Convention was subsequently drafted and

ratified to foster and encourage the international recognition and enforcement of arbitration agreements and to establish a mechanism for enforcing such agreements.

While the Convention is strikingly similar to Chapter 1 of the FAA, there are some notable differences. First, while a district court has the power under Chapter 1 of the FAA, 9 U.S.C. § 3, to stay an action pending arbitration and has the power under 9 U.S.C. § 4 to compel the parties to arbitrate so long as the place of arbitration is within the district where the court is located, the FAA does not empower the federal court to compel arbitration outside the district. The Convention, by contrast, allows a court to compel arbitration outside the district—including in another country. Similarly, the FAA and the Convention have different timebar provisions, *compare* 9 U.S.C. § 9 with 9 U.S.C. § 207, and somewhat differing standards for when an award may be vacated, with the Convention's list of permissible grounds for *vacatur* being narrower. *Compare* Convention, Art. V with 9 U.S.C. §§ 10, 11.

And, of course, Chapter 1 of the FAA and the Convention have different standards for when an arbitration agreement falls within its scope. Under the FAA an agreement to arbitrate merely must be "written," 9 U.S.C. § 2, whereas the Convention provides that the agreement must be "signed by the parties or contained in an exchange of letters or telegrams." 9 U.S.C. § 201, Art. II(2). Numerous decisions have made clear that the FAA does not require an arbitration agreement to be signed to be enforceable, *see e.g., Interocean Shipping Co. v. Nat'l Shipping and*

Trading Corp., 523 F2d 527, 539 (2d Cir. 1975), whereas there is a split of authority on the precise requirements of the Convention. *Compare Sphere Drake, Inc. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994) with *Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd.*, 186 F.3d 210 (2d Cir. 1999).

Respondents contend (Br. 18-21) that it would be improper to find an arbitration provision enforceable under the FAA where it did not meet the writing requirements of the Convention. But this argument wrongly assumes that the two statues cannot peacefully coexist. To be sure, where an arbitration agreement falls under the Convention—*e.g.*, where all of the requirements of the Convention relating to the nature and form of the agreement and the place of arbitration are satisfied—then the Convention governs, and "Chapter 1 [of the FAA] applies . . . to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208.

But if the Convention does not apply—where, for instance, the place of arbitration is not in a jurisdiction that is a signatory to the Convention, or where the agreement does not meet the writing requirements of the Convention—nothing in the United States' ratification of the Convention suggests that it was the intent of Congress that the FAA should not still apply in its own right, independently from the Convention, as the Federal law of the land. Of course, in such case a court could not utilize the Convention's power, absent in Chapter 1 of the FAA, to compel arbitration outside its district (though it could stay the litigation pending

arbitration pursuant to 9 U.S.C. § 3). Moreover, the successful party could not rely on the Convention's longer timebar provisions, provided in 9 U.S.C. § 207, for seeking recognition and enforcement of the arbitration award, nor could it rely on the Convention's restrictive limitations on when an award may be vacated.

There is nothing, however, in the language of the FAA or the Convention, or in the Federal policy interests upon which the United States' ratification of the Convention is based, to suggest the Convention was intended to preempt the FAA in this respect. Indeed, such a finding would be fundamentally backwards. The FAA and the Convention were both designed to *encourage* arbitration and to foster the enforcement of arbitration awards, and there is no support for the suggestion that the United States intended to *narrow* the grounds available for enforcement of arbitration agreements under the FAA by its ratification of the Convention. Rather, the opposite clearly was the case.

Respondents' interpretation of Article VII of the Convention as applying only to arbitration awards and not agreements to arbitrate is flawed. In the first place, the present case falls even within Respondents' restrictive reading of this section because Petitioner Neilson is seeking to "avail himself of an arbitral award" within the meaning of Article VII by seeking to compel arbitration of Respondents' claims. In any event, the intent of Article VII is to make clear that nothing in the Convention should be construed as limiting a party's ability to seek relief under another treaty or domestic statute where that other treaty or statute is more favorable towards arbitration than the Convention. That

is precisely the case here, where the writing requirements of the FAA are arguably more lenient than those of the Convention.

This interpretation is made explicit by UNCITRAL in its July 7, 2006 recommendation, (*see* Petitioner's Main Brief, 25-a), which explicitly recommends:

> That article VII, paragraph 1 of the Convention . . . should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

The UNCITRAL recommendation thus speaks *directly* to the present situation, where the arbitration provision in Neilson's Employment Agreement indisputably would be enforceable under the FAA even if it were not enforceable under the Convention. And UNCITRAL is clear that Petitioner should be permitted to rely on that more favorable domestic legislation in seeking enforcement of its agreement to arbitrate if the Court concludes that the Convention does not apply.

D. *There Is A Split Of Authority On The Proper Interpretation Of Article II(2)'s Writing Requirement*

It is a matter of record that the Second and Fifth Circuit Courts Of Appeals have interpreted Article II(2) of the Convention quite differently. *Compare Sphere Drake, Inc. PLC v. Marine Towing, Inc.*, 16 F.3d 666

(5th Cir. 1994) with *Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd.*, 186 F.3d 210 (2d Cir. 1999). And it can hardly be disputed that if the Fifth Circuit's interpretation were followed by this Court, the question of whether Neilson's Employment Agreement was "signed by the parties or contained in an exchange of letters or telegrams" would never arise, because under the Fifth Circuit's interpretation that requirement only applies to stand-alone arbitration agreements, and not to arbitration provisions contained in contracts. *Sphere Drake* at 669. Petitioners have acknowledged that the decision in *Sphere Drake* has been criticized; however, that decision is in fact more consistent with UNCITRAL's recommendation in favor of an inclusive reading of Article II(2), (*see* Main Brief, 29-a), and also clear Federal policy, as embodied in 9 U.S.C. § 2, that a written arbitration provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Respondents raise technical objections to Petitioners' raising of this split of authority to this Court, but of course the proper interpretation of the writing requirement of Article II(2) of the Convention clearly *was* a central issue raised before the lower courts—and, indeed, the decisions below turned directly on this issue—so Respondents' suggestion that the petition fails to raise an important issue of Federal law addressed by the courts below is simply wrong.

E. *The Missouri Court Of Appeals Erred In Failing To Refer Issues Of Arbitrability To The Arbitrators Pursuant To The Clear And Unmistakable Provisions Of The Employment Agreement And The Asset Purchase Agreement*

Respondents rely (Br. 28-29) solely on Missouri state law to contend that the Missouri Court of Appeals acted properly in deciding the question of arbitrability in this case. But the United States Supreme Court has made clear that in analyzing the question of arbitrability, the courts must first consider whether the parties agreed to submit questions of arbitrability to the arbitrators. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Where the evidence is "clear and unmistakable" that they agreed to do so, that agreement must be honored and the case referred to the arbitrators for a determination of arbitrability. *Id.*

Respondents dismiss *First Options* in a footnote (Br. 21, n. 8), noting that "the Missouri Court did not cite or refute *First Options* in any way." Of course, this statement merely underlines the fundamental failure of the Missouri Court of Appeals' reasoning and decision. Had that court properly considered this Court's directive in *First Options*, it would have concluded that the issues of whether the claims against Neilson, Atlas and GIL are subject to arbitration must themselves be submitted to arbitration, and it would not have undertaken its improper "threshold" analysis of the claims and the agreements.

As to the Atlas/GIL asset purchase agreement, Respondents gloss right over the unequivocal contract language and set right to attacking the decisions in *Contec Corp. v. Remote Solution Co. Ltd.*, 398 F.3d 205 (2d Cir. 2005), *Terminix Int'l Co., LP v. Palmer Ranch LP*, 432 F.3d 1327 (11th Cir. 2005), and the many decisions following them, which hold that where the parties have incorporated arbitration rules such as the AAA Rules here at issue which "clearly and unmistakably" refer issues of arbitrability to the arbitrators, those rules must be enforced under *First Options*. Of course, the language of the Asset Purchase Agreement is itself crystal clear on this point without need to even refer to the AAA rules. It provides: "The parties agree this is a broad form arbitration agreement, designed to encompass all possible Disputes, *including Disputes over arbitrability or jurisdiction.*" (Emphasis added). It would be frivolous for Respondents to dispute the clear and unmistakable intent of this clause to refer all issues of arbitrability to the arbitrators, and indeed Respondents do not even purport to do so in their Response.

Insofar as Neilson's Employment Agreement is concerned, Respondents' criticism of *Contec, Terminix* and the other similarly holding decisions is baseless. It is trite law that arbitration rules incorporated into a contract are fully enforceable, and every Federal court of appeals which has considered the issue has agreed with the *Contec* court that incorporation by reference to arbitration rules which themselves clearly and unmistakably refer issues of arbitrability to the arbitrators must be enforced under *First Options*. Indeed, the FAA has been held to prohibit courts from

imposing stricter rules for the enforcement of arbitration provisions in a contract than would apply to the other contract terms. *See, e.g., Doctor's Assoc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [9 U.S.C. § 2]."). As such, there is no basis to subject the arbitrability provision of the AAA Rules to any stricter scrutiny than would apply to the rest of the agreement.

Respondents attempt to defend the correctness of the Missouri Court of Appeals' conclusion that the claims were not subject to arbitration, but this is not the question. The question is whether the courts below acted properly in considering this issue in the first place. The law could not be clearer that they should not have done so. The issue of arbitrability was "clearly and unmistakably" referred to the arbitrators, both in the Employment Agreement by incorporation of AAA rules which so provide, and in the Asset Purchase Agreement by explicit contract language and also in governing AAA rules. As such, the question of arbitrability should have been referred to the arbitrators in each instance and should not have been decided by the courts below.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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